

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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ARCH A. MOORE, JR.
Governor

January 9, 1986

Basil R. Legg, Jr., Esquire
1604 West Main Street
Princeton, WV 24740

Executive Officer
United Pocahontas Coal Company
Shannondale Corporation, Mine #10
P.O. Box 740
Bluefield, WV 24605

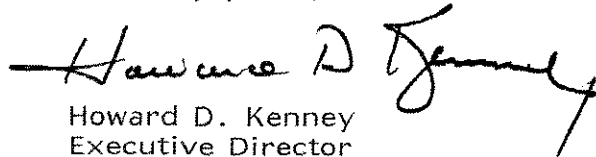
RE: Harless v United Pocahontas Coal Co. & Shannondale Corp.,
Mine #10, EA-433-81

Dear Mr. Legg & Dear Sir:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Donald D. Harless v United Pocahontas Coal Company & Shannondale Corporation, Mine #10, EA-433-81.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/kpv
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DONALD D. HARLESS,
Complainant,

vs.

Docket No.: EA-433-83

UNITED POCAHONTAS COAL COMPANY,
and SHANNONDALE CORP. MINE #10,

Respondents.

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W.V. HUMAN RIGHTS COMM.

ORDER

On the 11th day of December, 1985, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Charles A. Riffie, II. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own with the exceptions set forth below.

The Commission hereby amends the Findings of Fact and Conclusions of Law by adding to paragraph 2 of the Recommendation at page 7, after the phrase the "amount of \$96,000.00", the following language: "and pre-judgment interest at ten percent (10%) per annum from November 11, 1982 until August 5, 1985, the date of this hearing, on the back pay . . ."

The Commission further amends the Findings of Fact and Conclusions of Law by adding and the following language at the end of paragraph 2: "In addition the respondents shall offer to complainant the first available job for which he is qualified."

It is hereby ORDERED that the Hearing Examiner's Findings of

Fact and Conclusions of Law be attached hereto and made a part of this Order except insofar as they are amended by this Order.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 19th day of Dec., 1985.

Respectfully Submitted,



CHAIR/VICE-CHAIR
West Virginia Human
Rights Commission

*Approved
WCS
10/9/85*

**WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

DONALD D. HARLESS,
Complainant

vs:

Docket No. EA-433-83

UNITED POCAHONTAS COAL COMPANY AND
SHANNONDALE CORP. MINE #10,

Respondents

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Pursuant to a Notice issued and served upon the Complainant and Respondents, which Notice was dated May 21, 1985 and given by Russell Van Cleve, Chairperson of the West Virginia Human Rights Commission, which Notice on the Respondents was served through the Office of the Secretary of State of West Virginia, a pre-hearing conference was held in City Council Chambers, City Hall, Princeton, West Virginia, on June 17, 1985, at 10:00 a.m., at which time the Complainant appeared in person and by Counsel, Basil R. Legg, and the Respondents made no appearance. On Motion of Complainant's Counsel, the public hearing date also specified in said Notice previously served on Respondents through the Secretary of State, was left as scheduled on July 29, 1985.

Pursuant to the aforesaid Notice dated May 21, 1985, Complainant appeared in person and by Counsel, Basil R. Legg, at the public hearing and the Respondents made no appearance at the time, date, and place specified in said Notice on July 29, 1985.

An examination of the file at the Offices of the West Virginia Supreme Court of Appeals for the West Virginia Human Rights Commission indicates that no Answer has been filed and received on behalf of Respondents.

Counsel for Complainant has made a Motion for Default Judgment in accordance with Rule 7.21 pursuant to Respondents' failure to appear, answer, or otherwise defend, which Motion, in the opinion of the Hearing Examiner, should be granted.

A hearing on the issue of damages and action to be taken by the Commission only was postponed and set by the Hearing Examiner for the 5th day of August, 1985, at which time the Complainant appeared in person and by Counsel, Basil R. Legg, Jr., and the Respondents made no person. Also present were the Court Reporter, Bonnie Sue Tichenor, and Charles A. Riffie, II, Hearing Examiner.

FINDINGS OF FACT

1. Complainant filed a verified Complaint in the West Virginia Human Rights Commission against Respondents on the 28th day of December, 1982, complaining of age discrimination as specified therein.

2. After a probable cause determination, the West Virginia Human Rights Commission notified the Complainant and Respondents by Notice dated May 21, 1985, and served on Respondents through the Office of the Secretary of State of West Virginia on May 23, 1985.

3. Pursuant to Notice properly served, the Respondents have failed to appear, answer, or otherwise defend at the time and place designated in said Notice.

4. Complainant testified he was released from employment from United Pocahantas Coal Company on November 11, 1982; that his rate of pay

was \$2,700.00 per month exclusive of his company benefits; that he was to have received a raise in pay on January 1, 1983, to \$3,000.00 per month, exclusive of benefits.

5. Complainant further testified that he was not paid for the month of November, 1982; that he was due the sum of \$5,400.00 through December, 1982, and through the date of the hearing, being 32 months at \$3,000.00 per month, back wages due him amounted to \$96,000.00.

6. Complainant further testified that in regard to the fringe benefit of hospitalization insurance, comparable insurance cost approximately \$350.00 per month, and over a period of 34 months that he is due \$11,900.00 for the cost of hospitalization insurance.

7. Complainant further testified that he was due the value of vacation and retirement benefits of approximately \$300.00 per month which amounts to \$10,200.00 per month over 34 months.

8. Complainant further testified that certain hospital and physician bills paid by him were not covered by insurance in the amount of \$3,500.00; and that the total amount due to him for back wages, hospitalization, vacation, and retirement benefit and uncovered medical bills is \$117,000.00.

9. Complainant and his wife both testified as to the embarrassment, mental and emotional suffering and distress of the Complainant who became depressed, contemplated suicide, started drinking heavily, and saw a psychiatrist by the name of Dr. Riaz seven or eight times.

10. Complainant's wife, Wanda G. Harless, further testified as to the strife in the marriage and the home with the children as a result of Complainant's depression and unemployment, inclusive of the need to sell furniture to live, the deprivation of the children of clothing, special school activities,

medical treatment to remove Polyps in the stomach of Complainant's daughter; and the children not having lunches for school.

11. Dale Rollin Shrewsbury, former President and Vice-President and Chairman of the Mine Safety Committee of UMW Local No. 6033 testified on behalf of Complainant and confirmed the value of the hospitalization, vacation, and retirement benefits as testified to by Complainant.

12. Complainant further testified that he seeks reinstatement to his job as Section Foreman that he be awarded back wages and benefits for the time he has been deprived of employment; and that he is ready, willing and able to return to work should he be offered a position with United Pocahontas Coal that was equivalent or higher paying than the one from which he was terminated.

CONCLUSIONS OF LAW

1. The Complainant is a person and within the protected class of individuals between ages forty (40) through sixty-five (65), within the meaning of the West Virginia Human Rights Act (W.Va. Code 5-11-1, et seq.).

2. Respondents are both "employers" within the meaning of the West Virginia Human Rights Act (W.Va. Code 5-11-1, et seq.).

3. Rule 7.21 (a) of the procedural regulations adopted by the West Virginia Human Rights Commission provides that if a Respondent fails to appear, answer, or otherwise defend, or, having appeared or answered, does not present evidence or otherwise defend the case at the hearing, the Commission shall find the Respondent to be in default and shall find the facts alleged in the Complaint to be true.

4. Rule 5.02 (a) of the aforesaid procedural regulations adopted by the West Virginia Human Rights Commission provides that the Notice of hearing shall state that a failure to answer may be deemed an admission to the allegations of the Complaint, and the Notice served in this case in fact contains this language.

5. Rule 5.01 of said procedural regulations provides, inter alia, that service of said Notice and Complaint upon the Respondent shall be in the manner provided by law for the service of Summons in civil actions and shall be served at least thirty (30) days prior to the time set for the hearing. Service upon other parties shall be by personal delivery or certified mail, return receipt requested.

6. Service of said Notice and Complaint upon Respondents was properly obtained by serving the Secretary of State of West Virginia. Rule 4 of the Rules of Civil Procedure for Trial Courts of Record in West Virginia; West Virginia Code 31-1-15, as amended.

7. Rule 6.01 of the aforesaid procedural regulations of the West Virginia Human Rights Commission provides that upon service of a Notice of hearing and a verified Complaint, a Respondent may file a written verified Answer in person or through an Attorney within ten (10) days from the service of such Complaint and Notice of hearing or may apply prior to the end of said ten (10) day period for an extension within which to file an answer for good cause shown.

8. When Respondents have been properly served with Notice containing the requirements of Rule 5.02 of the procedural rules adopted by the West Virginia Human Rights Commission, and failed to answer as required by said rules, or failed to appear or otherwise defend this proceeding, the Commission shall find the Respondents to be in default and shall find the facts alleged in the Complaint to be true.

9. The Commission may, as part of its cease and desist orders award Complainant incidental damages as compensation for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity, without proof of monetary loss. State Human Rights Commission v. Pearlman Realty Agency, 239 S.E. 2d 145 (W.Va. 1977).

10. The Commission may award a victim of discrimination who has prevailed on the merits back pay, including fringe benefits and bonuses provided that back pay should be reduced by interim earnings. Albemarle Paper Co. v. Moody 422 U.S. 405(1974); Johnson v. City of Keystone, ER 2-76; Thompson v. Blount Brothers Corporation, EA 292-75 and ER 293-75; Pamela Evans Franco v. Montgomery General Hospital, ES-146-77.

RECOMMENDATION

THEREFORE, pursuant to the above Finding Of Facts and Conclusions Of Law, it is hereby RECOMMENDED that an Order be entered by the Commission finding that the facts alleged in the verified Complaint heretofore properly filed are found to be true; that Respondents, United Pocahontas Coal Company and Shannondale Corp. Mine No. 10, have committed an unlawful discriminatory practice subject to the jurisdiction of the Commission in the unlawful termination of employment of the Complainant because of his age; and further Ordering the following:

1. Respondents, their officers, agents, employees, members, successors, assigns, and all persons and organizations who acted in concert or in participation with them are hereby permanently Ordered to cease and desist at all places of business or operations of Respondents from engaging in any actions which deny full and equal membership rights to any individual or otherwise to discriminate against such individuals on the basis of race, sex, religion, color, national origin, blindness, age or handicap with respect to hiring, tenure, terms and conditions of employment or any other matter directly or indirectly related to employment.

2. It is further ORDERED that Respondent shall pay to the Complainant compensation for loss of wages suffered by Complainant as a result

of Respondent's unlawful discriminatory practices. Back pay shall be determined as if the Complainant had occupied the position of Section Foreman from November 10, 1982 through the date of this Order, there being no testimony as to any employment of the Complainant since the time of his termination from employment by Respondent. The total wage which could have been earned at the Section Foreman position with a regularly scheduled promotion in January of 1983 is \$96,000.00. It is recommended that judgment be entered in favor of Complainant for back pay in the amount of \$96,000.00 and that Complainant further be awarded judgment in the sum of \$21,000.00 as compensation for hospitalization, vacation, retirement benefits and uncovered, unpaid medical bills denied to Complainant by his termination. Further, it is recommended that judgment be rendered in favor of Complainant in the amount of \$34,000.00 in incidental damages as compensation for humiliation, embarrassment, emotional and mental distress and loss of personal dignity suffered by both Complainant and his family. Complainant should also be awarded post judgment interest at the legal rate of interest from the date of the entry of the Commission's Order.

3. It is further recommended that Respondents shall comply with the Commission's Order within thirty (30) days from date of entry by the Human Rights Commission and that costs be awarded to Complainant.

DATED this 4th day of October, 1985.


CHARLES A. RIFFEE, II
Hearing Examiner